Supreme Court, U. S.
FILED
JAN 31 1980
MICHAEL RODAK, JR., CLERK

In The
Supreme Court Of The United States

OCTOBER TERM, 1979

NO. 79-1182

JOHN RUSSO, TRUSTEE
and
RUSSO DEVELOPMENT CORPORATION,
APPELLANTS
v.
TOWN OF EAST HARTFORD,
APPELLEE

ON APPEAL FROM THE
SUPREME COURT OF CONNECTICUT

JURISDICTIONAL STATEMENT

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January 20, 1980

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AND
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v.

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APPELLEE

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JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the Supreme Court of the State of Connecticut, entered on November 20, 1979, affirming a judgment of a State Referee in the Superior Court of Connecticut, and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal, and that a substantial question is presented.

OPINION BELOW

The opinion of the Supreme Court of Connecticut is reported in Volume XLI, No. 21 (November 20, 1979) of the Connecticut Law Journal. The opinion of the State Referee in the Superior Court of Connecticut is not reported. Copies of the opinion of the Supreme Court of Connecticut and of the State Referee in the Superior Court, are attached hereto as Appendix A.

JURISDICTION

This suit is an appeal from an assessment of damages in a condemnation action initiated by the Town of East Hartford, Connecticut, under Section 8-129 of the General Statutes of Connecticut. The Judgment of the Supreme Court of Connecticut was entered on November 20, 1979 affirming a judgment of a State Referee in the Connecticut Superior Court, and notice of appeal was filed on December 3, 1979 in both the Supreme Court of Connecticut and in the Superior Court. The jurisdiction of the Supreme Court to review this decision by direct appeal is confirmed by 28 United States Code, Section 1257(2). The following decisions sustain the Supreme Court's jurisdiction in this case: *Penn Central Transportation Co. v. City of New York*, 438 US 104, 57 L Ed 2d 631, 98 S Ct 2646, reh den (US) 58 L Ed 2d 198, 99 S Ct 226 (1978); *Pennsylvania Coal Co. v. Mahon*, 260 US 393, 43 S Ct 158, 67 L Ed 322 (1922); *United States v. General Motors Corp.*, 323 US 373, 65 S Ct 357, 89 L Ed 311 (1945); *Armstrong v. United States*, 364 US 40, 4 L Ed 2d 1554, 80 S Ct 1563 (1960); *United States v. Central Eureka Mining Co.*, 357 US 155, 78 S Ct 1097, 2 L Ed 2d 1228 (1958); *Goldblatt v. Hempstead*, 369 US 590, 8 L Ed 2d 130, 82 S Ct 987; *King Mfg. Co. v. City Council of Augusta*, 277 US 100; *Jamison v. Texas*, 318 US 413, 414; *Independent Warehouses v. Scheele*, 331 US 70, 79; *Poulous v. New Hampshire*, 345 US 395, 402; *Live Oak Ass'n v. Railroad Commission*, 269 US 359; *Lathrop v. Donohue*, 367 US 820, 825.

QUESTIONS PRESENTED

Have Appellants, landowners, received "just compensation" for the taking of their valuable, unique, earth landfill, lawfully used as such for more than six years, when the landfill is condemned by the Town of East Hartford three years later for landfill purposes, and valued by the Court, not as an earth landfill, but instead as a useless, worthless, hole in the ground that could not be filled, because the Court, in arriving at just compensation imposes certain never enforced zoning amendments, enacted more than six years after the landfill was lawfully established, to extinguish the lawful filling use and thus diminish the fair market value by more than 96%?

Is a payment of $47,500.00 to Appellants for the taking of their only earth landfill just compensation, when, as a consequence, they must expend in excess of $200,000.00 per annum in order to continue in business, because of the loss of this landfill?

Have the Appellants been deprived of all reasonable return on their investment, and has their land been taken without the payment of just compensation and without due process of law in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States by the belated imposition of certain never enforced use regulations, after the land had already been condemned, which are used to reduce the valuation of the site so as to value an existing earth landfill not as a landfill, but merely as a worthless, valueless hole in the ground?

Has the landowners' property been taken without the payment of just compensation when, after having purchased a 9.5 acre parcel of land with a large man-made hole, for the express

purpose of filling this hole with earth, and having lawfully filled this hole with earth for more than six years, certain restrictions are thereafter placed on the site by the State of Connecticut and by the Town of East Hartford, that allegedly require a permit for the continued filling of this parcel, which were never attempted to be enforced, and filling continues for three more years, at which time the parcel is condemned by the Town of East Hartford, owner of the adjoining Town Landfill, for landfill purposes, when the parcel is valued as if it were not an earth landfill because of these regulations, but is valued as a mere, valueless hole in the ground, reducing its fair market value from $1,200,000.00 as an earth landfill to $47,500.00 as a hole in the ground, by more than 96%?

Have the Appellants been afforded due process of law, when, because they never took the administrative steps to seek permits to continue to fill their earth landfill, lawfully utilized as an earth landfill for six years before permits to fill were alleged to be necessary, and their earth landfill is valued in a later condemnation proceeding not as an earth landfill, but as a hole in the ground that could not be filled without a permit?

Are statutes such as the Connecticut Inland Wetlands Act, Sections 22a-36 through 22a-45 of the General Statutes of Connecticut, as amended, and Sections 25-4a - 25-9e of the General Statutes of Connecticut (stream encroachment lines) constitutional, when they can impose upon a lawfully existing earth landfill, a never enforced requirement that a permit be obtained to continue that earth landfill and they are later construed in a condemnation hearing for a determination of just compensation for the taking of the landfill, to prohibit additional filling because of the failure to obtain such a

permit and thus destroy the value of the site to less than 4% of its value as a landfill?

Can a Town constitutionally adopt a zoning ordinance requiring a permit to fill and a permit to excavate property in the Town, and in the ordinance mandate that a permit "shall be issued" for an existing excavation use, yet fail to mandate a permit be issued for a validly and lawfully existing landfill use?

Are statutes such as Sections 25-4a - 25-9e of the General Statutes of Connecticut valid that permit a stream channel encroachment line to be established, without payment, over 1/3 of the Appellants' existing earth landfill, failing to provide for the payment of just compensation for the termination of the landfill use that was lawfully existing at the time of the imposition of this channel encroachment line, and which, in a subsequent condemnation of the property, is used to depress the value of the property as if this lawful use had been terminated?

Is a zoning ordinance of the Town of East Hartford, which later designates an existing and valuable landfill to be in a flood plain zone, and which ordinance only allows the property to be used for public recreational facilities or agriculture such as a truck farm, which uses are impossible because of the topography of the site and the size, shape and nature of the parcel, constitutional or is the property therefore confiscated and taken without the payment of just compensation if this amendment is used to reduce the value of the parcel from $1,200,000.00 to $47,500.00, by more than 96%?

STATUTES INVOLVED

Sections 22a-36 - 22a-45 of the General Statutes of Connecticut as amended (Inland Wetlands Laws); Section 25-4a - 25-9e of the General

Statutes of Connecticut, as amended (stream channel encroachment laws); Sections 370-378, 260-266, 210 and 230 of the Zoning Ordinances of the Town of East Hartford.

STATEMENT

The Appellants, the Russo family, engaged in earth-related businesses for four generations, in 1966 purchased a 9.5 acre parcel of land in the Town of East Hartford, Connecticut, for the specific purpose of using this site as an earth landfill in conjunction with their businesses. This parcel of land consisted of a man-made hole in the ground that had been "dug out" years before. The hole was approximately 25 to 30 feet in depth. This parcel was eminently suitable for its intended use as an earth landfill by refilling this hole with earth. The Russos' 9.5 acre landfill site was bounded on the West by the Town of East Hartford's Town Landfill, and was bounded on the South by another parcel of land owned by East Hartford.

After the purchase in 1966, the Russos cleared the entire 9.5 acre site of trees, built an earth rampway down into the land and commenced filling the hole with earth.

It was completely lawful for the Russos to establish this landfill and to use this site as an earth landfill. The Russos lawfully continued to fill this landfill with earth for approximately ten years thereafter. Between the purchase in 1966 and 1975, earth landfills became quite scarce, and were therefore quite valuable.

In 1975, the Russos' landfill was condemned and taken by the Town of East Hartford for landfill purposes.

The Russo landfill was known as an earth landfill in East Hartford, known as such in the immediate neighborhood, and was known as such to many Town of East Hartford officials. In 1974, one year before the condemnation of the Russo landfill, certain East Hartford officials requested that the Russos join with the Town to pay for the cost to construct a wire fence across

the front of their respective adjoining landfills in order to keep others from dumping garbage into these properties. The Russos agreed, and when the fence was constructed they paid for their portion of the cost of this new fence.

One year later in 1975 East Hartford condemned the Russo site and deposited the estimated damages for the taking, with the Clerk of the Connecticut Superior Court. Under the procedures provided, the Russos appealed to the Superior Court for a revaluation of the damages for this taking.

A State Referee was designated to hear the case and conducted the trial in late 1975. At this trial concerning the "just compensation" for the land taken, East Hartford argued that the Russos' earth landfill should not be valued as an earth landfill, because the Town claimed that in 1972, certain Town of East Hartford and State of Connecticut regulations had been passed, allegedly affecting this site and then requiring a permit to fill after 1972.

The evidence at the trial was uncontradicted that the Russos' filling at this site had never been stopped, never been modified or in any way reduced, and further that the Russos had never been stopped, advised to stop, given any advice, order, warning or other indication to cease or to discontinue, or to get a permit to continue filling.

The State Referee, however, citing *Goldblatt v. Hempstead*, 369 US 590, valued the Russo landfill, not as a landfill as it had been lawfully used for ten preceding years, but as a mere hole in the ground that could not be further filled on the date of taking.

He ruled the Russos had made no effort to obtain a filling permit. The Russos argued that the Zoning Amendment passed in 1972 could not

lawfully stop their lawful existing use, that they would have gotten a permit since the Zoning regulations and Section 8-2 of the Connecticut General Statutes required valid non-conforming uses to continue, if the Russos had merely asked. Now that the property had been condemned it was too late to apply for the permits that would be granted.

Six years after the Russos had lawfully established their landfill use, East Hartford in 1972 amended its Zoning Ordinances, and had adopted an excavation and filling permit regulation, Sections 260-266. This amendment automatically granted permits for existing excavation uses, but was silent as to existing filling uses.

By using this restriction on the previous lawful use as an earth landfill, the Fair Market Value was reduced from $1,200,000.00 if it could be filled, to only $47,500.00, a diminution in valuation of $1,152,500.00, or 96% of its fair market value.

In his valuation of the "just compensation" to be paid for the site in 1975, the State Referee also ruled that other restrictions, also never enforced, had in 1972 and after affected the site's use as an earth landfill.

In 1972 the lower 1/3 of the parcel had superimposed on it, by the State of Connecticut Commissioner of Environmental Protection, a channel stream encroachment line, pursuant to Sections 25-4a - 25-9e of the General Statutes of Connecticut. This was never enforced, nor was there a condemnation of this site. These statutes made some provision for the continuance of existing uses, and also required either a condemnation of the site or the removal of the line, if a taking had occurred. Neither of these reliefs were applied by the State Referee.

The Referee further ruled that in 1972 East Hartford had again amended its Zoning Ordinances,

and had superimposed on the existing R-4 Zoning on this site (permitting two-family homes) certain additional restrictions limiting the permitted uses to recreational purposes, without buildings, and agriculture including nurseries.

This 1972 amendment to the Zoning Ordinances, (Sections 370-378) allowed existing filling uses to continue, but required an appearance before a Town Board to show what one had been doing.

In 1974 and in 1975, the State of Connecticut adopted Inland Wetlands Laws, Sections 22a-36-22a-45 of the Connecticut General Statutes. Although effective in 1975, after the land condemnation had already started, the State Referee ruled these also required a permit to continue to fill, which the Russos had not obtained.

The Russos had never sought a permit, because they thought they didn't need one, and their continuous, unmolested filling had continued until the condemnation of their landfill in 1975.

The State Referee ruled the Russos should have obtained these permits when the various Regulations had become effective in 1972 and after.

The Russos argued they didn't need a permit because they had a long-standing, lawful existing use as an earth landfill, and had never been stopped or asked to stop in this use. Neither East Hartford nor the State of Connecticut officials had ever made any effort to modify or halt the Russos' continued filling, or to require that the Russos discontinue filling in order to obtain a permit to continue to fill. The first time any claim was made that a permit was required was at the trial concerning the payment of just compensation.

The fair market value of the Russo site was ruled by the State Referee diminished by $1,152,500.00, because of the failure to obtain

permits under these revised amendments. This valuable 9.5 acre landfill was taken away from the Russos for a total award of only $47,500.00. Evidence was uncontradicted that because of this loss of their only landfill, the Russos, in order to remain in business, must pay out more than $200,000.00 per annum.

There was no evidence that permits were not available. On the contrary all evidence was to the effect they would have been issued if ever requested.

HOW THE FEDERAL QUESTION IS PRESENTED

The Russos argued in the trial court that if these subsequently imposed and never enforced restrictions were ruled effective to diminish the "just compensation" payable for this valuable landfill, and utilized to destroy the long-standing lawful use as an earth landfill, this was in effect a confiscation of this valuable property, and a taking of the property without the payment of just compensation, and without due process of law, in violation of the Fifth and Fourteenth Amendments to the Constution of the United States. (12/4/75 pp.268-270,274) (5/1/76 pp.167-169)

The Russos further argued they had a valid existing lawful use as an earth landfill that could not be retroactively reduced in value at this late date by imposition of regulations, never lawfully tested as to their validity, never enforced, and calling for permits that by law had to be issued. (12/4/75 pp.268-270,274) (5/7/76 pp.178-181)

The Russos further argued throughout the trial the fill permit ordinance was unconstitutional in that it was vague and did not give the equal protection of the laws to landfill owners, as it did to excavation owners who were automatically granted a permit to continue to excavate.

The Russos also argued the Wetlands laws were not effective until late 1975, and the

premises had already been condemned in January 1975. (5/4/76 pp. 171-172)

At the second day of the long trial (12/4/75) counsel for the Appellants first raised the issue that the imposition of subsequently enacted regulations to limit the use of this site deprived the Russos of their property without due process of law. (P.251)

On the second day of trial (12/4/75) the State Referee noted that the established filling use on the Russo site was lawful from 1966 to 1972 (P.268), and he discussed East Hartford's argument that these subsequently imposed regulations did not deprive the Russos of their constitutional rights. (12/4/75-P.269-270) The State Referee noted the Russos' argument to the contrary, and questioned out loud whether by merely adopting these ordinances, East Hartford could deprive a person of his existing property rights without the payment of due compensation (P.274). He stated that the Town could not just confiscate this land. (12/4/75-P.274)

On 5/7/76, while Appellants were attempting to elicit testimony from an expert land appraiser to the effect that the subject land would be useless under the East Hartford Zoning Ordinance Flood Plain Amendment if applicable, the constitutional propositions of the Connecticut Supreme Court in *Dooley v. the Town of Fairfield*, 151 Conn. 304 were argued at great length.

The Russos, at the trial on the fifth day 5/7/76, argued that changing the zoning of their land to such very limited uses as "non-profit recreational facilities without buildings, and agricultural, including nurseries and truck farms", none of which were even possible in this very deep hole, was in effect an unconstitutional, confiscatory taking of this land, completely destroying the value of the property and rendering it useless. (5/7/76-pp.178 through 181)

Counsel again argued that the belated imposition of these regulations by the State Referee to reduce the value of this site, was confiscatory, destroying all value to the property and was unconstitutional. (5/7/76-pp.183 through 185)

Counsel argued that to now rule that permits had been necessary in the past to continue a lawful use and that without them the site was not an earth landfill, was an unconstitutional taking, and in effect a taking of the property without due process of law, violating the Fifth and Fourteenth amendments to the Constitution of the United States. (5/7/76-pp.185 and 186)

Continued arguments with the State Referee concerning this confiscation, and the violation of due process of law were made at the trial. (5/7/76-pp.187-190)

An expert real estate appraiser's testimony compared the fair market value of the property with and without these restrictions. Where additional filling was permitted, the fair market value was $1,200,000.00. Where additional filling was restricted because of these regulations, the fair market value was only $47,500.00, showing a diminution in fair market value because of these permit restrictions of $1,152,500.00. (5/7/76-pp.194 and 195)

Counsel for the Russos again argued the constitutional issues of confiscation, because of the very limited uses imposed by this subsequent zoning, and the destruction of all reasonable use and value, and the *Dooley* case supra, and that there was a taking of this property without due process of law and without the payment of just compensation, on May 7, 1976. (pp.200, 201, and again at pp.202-209) Counsel stressed the issue of an unconstitutional confiscation of the property by the zoning regulations at the hearing on May 7, 1976. (pp.204-209)

Counsel argued the Town could not merely take property without paying just compensation for it (5/7/76 p.209); that these permits, if now used by the Court to reduce the site's value, amounted to a "taking" (5/7/76 p.209) and that there were no reasonable uses for this property if these zoning amendments were now ruled by the State Referee to be applicable. (5/7/76 pp.210-212)

Additional expert real estate appraiser's testimony was again elicited at the trial on May 7, 1976, again showing the diminution in the fair market value of the site, and a comparison of these values, with and without these zoning restrictions, (from $1,200,000.00 to $50,000.00, a diminution of $1,100,000.00, (96%). (5/7/76 p. 310)

Expert real estate appraiser's testimony demonstrated that because the Russos had lost their only landfill, they would have to pay out more than $200,000.00 per annum in order to stay in business, because a replacement landfill was almost non-existent. The Russos would, because of the loss of this landfill site in 1975, be forced to travel great distances, and there be required to pay others for the privilege to dump earth into these other landfills. (5/7/76 pp. (12/4/79 300-302, Memorandum of State Referee)

Counsel for the Russos argued there had been no failure to exhaust administrative remedies (5/7/76 p.207) since the permits would have been issued if requested, and that that issue was not applicable under the circumstances of this case. There had been no warning of the condemnation, and under the circumstances of a condemnation case, with no previous orders or requests to stop, requests to get a permit, advice of any kind to get these permits, there had never been any occasion for the Russos to even think they needed a permit. Counsel argued had they asked for a

permit, they would have had to get one under the law of non-conforming uses. (12/4/75 pp.171, 172; 251-254; 269) (4/3/76 p.20) (5/10/76 p.207-209; 261-268) But the Russos had been trapped into a sense of false security. Once the property was condemned by the Town, with never a previous word, it was too late to then get a permit, and the trap was sprung closed. (5/10/76 pp.200-202; 207-209; 261-268) (12/4/75 pp.269-274)

In Appellants' Brief on the appeal to the Supreme Court of Connecticut, Appellants argued that these subsequently imposed restrictions affecting the free use of the property to reduce the just compensation were unconstitutional (p.14) and that the continuance of the non-conforming filling use was a constitutional requirement. (p.20)

The Brief argued that 'just compensation' meant "the full, perfect and exact equivalent, in money, for the property taken." *Monongahela Navigation Co. v United States*, 418 U S 312, 326 (p.40), and that imposition of these restrictions denied just compensation.

The Appellants' Brief raised the Constitutional requirements of "just compensation" and "due process of law", as mandated by the Fifth and Fourteenth Amendments (pp.41-45) and that these Constitutional requirements had been denied Appellants.

The Brief argued these subsequently imposed restrictions amounted to a confiscation of this valuable property and constituted a taking without the payment of just compensation and without due process of law. (pp.45-55)

THE QUESTIONS ARE SUBSTANTIAL

In determining the "just compensation" for the taking of the Appellants' earth landfill, can the Court diminish the fair market value of the landfill by more than 96% by ruling that the landowners, 3 years before, should have administratively sought permits to continue to fill their land, land that they had lawfully filled for the preceeding 6 years, when: (a) The earth landfill had been lawfully established and lawfully used as such for more than 6 years; (b) This lawful use was known to the officials of the Town of East Hartford, and this landfill was located adjacent to the Town's Landfill; (c) One year after the permits allegedly became necessary, officials of the Town of East Hartford actually built a fence across this site and one of the Town's landfill sites to keep others from dumping garbage into them, but these officials never required that the Appellants cease filling or obtain a permit; (d) Three years later, with never a word to anyone, this same Town of East Hartford condemned the site in order to expand the Town Landfill, and the Court ruled that "just compensation" for the landfill is $47,500.00, not $1,200,000.00, because the Appellants had neglected to administratively seek a permit to fill under the Town's amended zoning regulations, so the landfill is valued as if it cannot be filled.

Can the mandates of the Fifth and Fourteenth Amendments, requiring just compensation for property taken for public use and due process of law, be so easily circumvented by a Government, bent on expanding its valuable landfill at the expense of these landowners?

"Just compensation" for the taking of private property requires "a full and perfect equivalent for the property taken."

Monongahela Navigation Co. v. United States, 148 US 312, 326, 37 L Ed 463, 13 S Ct 622 (1893); *Penn Central Trans. Co. v. New York*, 438 US 104, 57 L Ed 2d 631, 98 S Ct 2646, reh den (US) 58 L Ed 2d 198, 99 S Ct 226.

The "Fifth Amendment's guarantee that private property shall not be taken for public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."

Armstrong v. United States, 364 US 49, 4 L Ed 2d 1554, 80 S Ct 1563; *Penn Central Trans. Co. v. New York*, 438 US 104, at 124, 148; *United States v. Central Eureka Mining Co.*, 357 US 155,168, 2 L Ed 2d 1228, 78 S Ct 1097 (1958).

In *Goldblatt v. Hempstead*, 369 US 590, 594 8 L Ed 2d 130, 82 S Ct 987 (1962) this Court, in testing the validity of an ordinance that prohibited mining of earth below a certain level, noted that there was absolutely no proof in the record of the effect of the ordinance on the fair market value of the land. This Court assumed that the ordinance did not prevent the owners' reasonable use of his property since "there is no evidence in the present record which even remotely suggests that prohibition of further mining will reduce the value of the lot in question."369 US at 394.

Contrary to *Goldblatt*, in the case at bar, the Russos proved through two expert real estate appraisal witnesses, that the imposition on the fair market value of the subject site of these subsequently enacted regulations, which were ruled by the Trial Court to curtail further

filling on the date of taking, amounted to a diminution in the fair market value of the site from $1,200,000.00 to $47,500.00, i.e. by $1,152,500.00, or more than 96%. This is found in the Trial Court's Memorandum of Decision.

Further, in *Goldblatt*, the landowner always had another day in court in order to receive "just compensation" if the effect of the ordinance were found to be onerous. Goldblatt could utilize his property and if the ordinance had an adverse effect on the value of the land, he could return and have his day in court. That is not true in the case at bar, the Russo landfill has been taken, and is gone forever.

Justice and fairness require that the economic injuries caused by the public actions in the case under appeal, be compensated by the Town of East Hartford in the condemnation case, rather than remain disproportionately concentrated on the landowners.

> *Penn Central Trans. Co. v. New York*, supra at 124, 148; *Pennsylvania Coal Co. v. Mahon*, 260 US 393, 67 L Ed 322, 43 S Ct 158, 28 ARL 1321; *United States v. Central Eureka Mining Co.*, 357 US 155, 168, 2 L Ed 2d 1228, 78 S Ct 1097 (1958); *United States v. Caltex, Inc.*, 344 US 149, 156, 97 L Ed 157, 73 S Ct 200 (1952); *Nectow v. Cambridge*, 277 US 183, 188, 72 L Ed 842, 48 S Ct 447 (1928); *Moore v. East Cleveland*, 431 US 494, 513-514, 52 L Ed 2d 531, 97 S Ct 1932 (1977).

The subject parcel of land was specifically purchased in 1966 by the Russos for use as an earth landfill, in conjunction with their long-existing earth-related businesses. They cleared the land, built a roadway into the land, and had

been lawfully using it as an earth landfill for more than six years before any regulation had been imposed on the use of the property. They had a valid use that became a valid non-conforming use when the regulations became effective. In the interim, their landfill had become a quite valuable and scarce asset.

After the ordinances were amended, the Russos were never advised at any time by anyone that the property or its existing use had been in any way modified. The Town officials knew they were filling, yet said nothing. The Russos continued about their business of filling as they had in the past, for three more years and were never asked to get a permit.

The subsequently enacted 1972 and after regulations, held applicable to reduce the valuation of the land in the 1975 condemnation, completely destroyed the Russos' investment-backed expectations. Even more inequitable, is the proven fact that the loss of their only landfill will require that the Russos pay out of their pockets more than $200,000.00 per annum, to utilize alternate landfill sites owned by others, in order to remain in business.

Surely this is not equity or justice; $47,500.00 surely is not just compensation under these circumstances.

Surely this is a severe penalty to impose on the Russos, practically destroying their business and livelihood, for the benefit of the entire Town of East Hartford in the expansion of the Town Landfill, at the expense of these hardworking people.

The decrease in the value of the property of $1,152,500.00, more than 96%, is quite relevant in determining that there has been a taking, e.g. *Goldblatt v. Hempstead*, 369 US 590,

supra, even though there is no set formula to determine where regulation ends and taking begins.

A comparison of values before and after is relevant, although not conclusive, but surely leaving less than 4% of the value of the land should be determinative.

> *Penn Central Trans. Co. v New York*, 438 US 104, 57 L Ed 2d 631, 98 S Ct 2646 (1978) reh den (US 58 L Ed 2d 198, 99 S Ct 226; *Pennsylvania Coal Company v. Mahon*, 260 US 393, 67 L Ed 322, 43 S Ct 158, 28 ALR 1321.

The facts of *Penn Central Trans. Co. v. New York*, supra, are somewhat similar to the case at bar. There the owner of Grand Central Station had opposed the landmarks designation on its property, but, like the Russos in the case at bar, this landowner did not seek judicial review of this designation. Yet this failure of the Russos to act administratively caused the Trial Court to impose a tremendous penalty on them, valuation of their property as if all lawful uses had terminated. No such burden was imposed on the Penn Central Transportation Company for its failure to seek judicial review nor should it be.

Later when Penn Central sought approval for a proposed building and was turned down, again rather than seeking administrative or judicial review of the Commisssion dissapproval, Penn Central brought suit claiming a taking, and a violation of the Fifth and Fourteenth Amendments. Similarly, had the Russos ever been warned, or ordered to stop or to curtail their filling, or had they ever been requested to obtain a permit, they simply could have asked for a permit and received a permit or then sought judicial redress if wrongfully denied.

The difference in the results of *Penn Central* and the case at bar are quite clear.

In *Penn Central* this Court held that the landmark regulations did not effect a taking of the property because: (1) the law did not interfere with the present uses of the Terminal, but allowed the owner to continue using it as had been done in the past, thus permitting the owner to profit from the building and obtain a reasonable return on his investment. (In the case at bar, however, the long-standing lawful use as an earth landfill, was at the trial, retroactively declared to have been not allowed. The Russo land had been in fact taken, so there could be no further use of it by the Russos. All reasonable return on their investment in the landfill had been destroyed, and the Russos in fact sustained a substantial loss, their property being diminished in value by more than 96%.)

(2) In *Penn Central*, there was some construction in the air space that was still possible, and

(3) The law did not deny all use of the owner's pre-existing air rights above the landmark building, since under a transferable development rights program, it was possible for Penn Central to transfer the development rights to neighboring properties which it owned.

(In the case at bar, all of the property of the Russos was taken, their only landfill.) There were no other landfills the Russos owned. They could use others only by incurring a tremendous expense. All previous use as a landfill in the valuation, was at the trial ruled destroyed, by the previous failure to administratively seek a permit.

Unlike this Court's holding in *Goldblatt v.*

Hempstead, supra, where there was "no evidence in the present record which even remotely suggests that prohibition of further mining will reduce the value of the lot in question", 369 US at 594, in the case at bar, two real estate appraisal experts clearly testified at great length of the adverse effect of these regulations on the fair market value of the real estate. One testified there would be a diminution in value from $1,200,000.00 to $47,500.00, i.e. $1,152,500.00 (96+%) and the other from $1,200,000.00 to $50,000.00, i.e. $1,100,000.00 (96+%).

The Russos' distinct investment-backed expectations were completely destroyed. This land had been specifically purchased for use as an earth landfill, and so used.

> *Penn Central Trans. Co. v. New York*, supra, 438 US at 124; *Pennsylvania Coal Co. v. Mahon*, supra, 260 US 393 at 414-415.

The site had been completely cleared, and a road built into the property. The site had been used for ten years as an earth landfill in conjunction with the Russos' businesses. There was expert testimony that in 1975, earth landfills were at a premium, they were almost non-existent. Landfills were unique and were very scarce and valuable. The Russos owned such a valuable asset that was taken away from them.

There was further expert testimony that because the Russos lost their only landfill, in order to continue in business, as they had for 83 years before, they would have to pay out to others more than $200,000.00 per annum to replace this landfill. Yet the Russos were awarded only $47,500.00 total for this landfill, because the Trial Referee imposed, after the

fact, the never enforced or never judicially tested 1972 permit regulations to smother the existing use, and thus dramatically decrease the land's value.

As surely as the air flights destroyed the chicken farm below in *United States v. Causby*, 328 US 256, 90 L Ed 1206, 66 S Ct 1062, this belated enforcement of these regulations destroyed this landfill.

Unlike *Penn Central*, the laws and ordinances applied in the case at bar, completely interfered with the present uses of the subject parcel, and by their application destroyed just compensation. This belated imposition of the regulations failed to permit the owners to profit from their property, or to obtain any reasonable return on their investment.

Further, as noted in *Penn Central*, where the challenged law did not necessarily prohibit occupancy of any of the air space above the landmark building, and it was possible that some construction in that air space might be allowed, all was not lost in *Penn Central*. In the case at bar, however, the condemnation of the real estate has foreclosed forever, the landowners' chance of using this landfill again.

Moreover, in *Penn Central*, the challenged law did not deny all use of the owner's pre-existing air rights above the landmark building, since under the transferable development rights program, it was possible for the owner to transfer these development rights to other neighboring properties which it owned. In the case at bar, the Russos were forever foreclosed from obtaining a permit if necessary, or from seeking compensation for the prohibitions of these regulations, and the site was thereupon valued by the Trial Court as if it were useless (less than 4% of its fair market value).

In *Maher v. New Orleans*, 516 F 2d 1051 (CA 5 1975) as in *Penn Central*, the landowner had other uses available. Penn Central could return to the Commission with another proposition, for example, a smaller, harmonizing structure might be authorized, or in the alternative, the pre-existing air rights could be transferable to other parcels in the vicinity of the Terminal, mitigating whatever financial burdens Penn Central had sustained. Maher could rent the property, and thus realize some return.

In the case at bar there can be no such transfer, or other use. The evidence was clear that in 1975, the Russo landfill was a unique, scarce monopoly -like asset, and that landfills in a 25 mile radius in and around Hartford, Connecticut, were almost non-existent. The loss of this landfill therefore, was the loss of a unique, monopoly-like asset of great value to the landowners.

The loss of this "use" as a landfill, destroyed its value the same as if the land had been constantly flooded as in *United States v. Cress*, 243 US 316, 61 L Ed 746, 37 S Ct 380 (1917).

This taking requires "just" compensation, for the valuable asset taken for public use. *United States v. General Motors Corp.*, 323 US 373, 89 L Ed 311, 65 S Ct 357, 156 ALR 390 (1945); *United States v. Lynak*, 188 US 470, 47 L Ed 539, 23 S Ct 349; *United States v. Pewee Coal Co.*, 341 US 114, 17, 95 L Ed 809; *United States v. Dickinson*, 331 US 745, 91 L Ed 1789, 67 S Ct 1382 (1947).

A landowner in a condemnation case, is to receive the full, complete, true value of the property taken. *Monongahela Navigation Company v. United States*, 148 US 312, 37 L Ed 463, 13 S Ct 622 (1893).

Property is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired. *Penn Central Trans.Co.v.New York*, 438 US at 146, *United States v. Dickinson*, 331 US 745, 748, 91 L Ed, 1789, 67 S Ct 1382 (1947). See also *Dugan v. Rank*, 372 US at 625, 10 L Ed 2d 15, 83 S Ct 999.

"If the adjective 'just' had been omitted, and the provision was simply that property should not be taken without compensation , the natural import of the language would be that the compensation should be the equivalent of the property. This is made emphatic by the adjective 'just'. There can, in view of the combination of those two words, be no doubt that the compensation must be a full and perfect equivalent for the property taken." *Monongahela Navigation Company v. United States*, 148 US 312, 326, 37 L Ed 463, 13 S Ct 622; *United States v. Lynak*, 188 US at 465, 47 L Ed 593, 23 S Ct 349; *United States v. Pewee Coal Company*, 341 US 114, 117, 95 L Ed 809, 71 S Ct 670 (1951).

The ordinances applied by the State Referee were constitutionally defective.

The 1972 zoning amendment, Section 270, requiring a permit to fill or a permit to excavate, automatically mandates permits be issued for an existing excavation, but is totally silent for an existing landfill.

This oversight was argued at length before the Trial Court and in briefs on the appeal to

the Connecticut Supreme Court.

An ordinance adversely affecting an existing lawfully established and long held use, should mandate a permit be issued for filling as it does for digging. As a matter of fact, filling may be considered less noxious than digging, especially in the context of a man-made previously excavated hole in the ground.

The State of Connecticut Inlands Wetlands Act was applicable to the Town of East Hartford only in mid-1975. By its very terms, the Act did not go into effect until after January 20,1975, the date condemnation papers were served.

The Supreme Court shall decide if the Appellants have standing to challenge the State statutes on federal Constitutional grounds. *Allied Stores of Ohio v. Bowers*, 348 US 522,525.

The usual manner in which Connecticut permit ordinances or regulations are tested is either when a Governmental authority seeks to halt an activity, or the landowner desires to engage in a regulated act and is prohibited by the governing body from such use. The Court then tests the effect of the ordinance to determine whether it is a valid exercise of the police power, or a confiscatory taking requiring the payment of just compensation. In the case at bar there was no need to seek either of these alternative procedures.

For example, in *Wallingford v. Roberts*, 145 Conn. 682 (1958) (a Town sought to enjoin a trailer camp); *Libby v. Board of Zoning Appeals*, 143 Conn. 46 (1955) (regulation for single family zoning held destroyed value of property and confiscated property); *Suffield Heights Corp. v. Town Planning Commission*, 144 Conn. 425 (1957) (zoning classification permanently restricting the

the enjoyment of property to such an extent that it cannot be utilized for any reasonable purpose, held beyond valid regulation and constitutes a taking without due process of law); *Del Buono v. Zoning Board of Appeals*, 143 Conn. 673 (1956) (landowners' petition for changed use granted where limited authorized uses amounted to confiscation *Dooley v. Town Planning and Zoning Commission*, 151 Conn. 304 (1964) (administrative remedies need not be exhausted to test flood zone zoning, and zoning allowing very limited uses held a taking, requiring just compensation); *Groton v.Tarasevich*,165 Conn. 86 (1973) (Town sought to halt use as trailer park without permit and landowners could seek Court remedy in future if permit arbitrarily refused).

The Connecticut Supreme Court has held that it is improper to seek both approval from an administrative body for a certain use under a provision of the zoning regulations, and at same time attack the constitutionality of these zoning provisions. An independent proceeding is necessary. *Strain v. Zoning Board of Appeals*, 137 Conn. 36, 38 (1950); *Chudnov v. Zoning Board of Appeals*, 113 Conn. 49, 57, 154 A.161; *Lathrop v. Norwich*,111 Conn. 616, 626, 151 A. 183; *Rindge v. Holbrook*,111 Conn. 72, 77,149 A.231; *Holley v. Sunderland*, 110 Conn. 80, 85, 147 A 300; *Ruppert v. Liquor Control Commission*, 138 Conn. 669 (1952).

The logic of the Trial Referee would have required the Russos, commencing in 1972, although never required to do so, to stop their business and simultaneously take administrative appeals and separate court actions on five different occasions. Ten lawsuits, for each of the five restrictions placed on their landfill, even though the Russos never dreamed their long existing, valid landfill use would be subject to a restriction of any kind.

In all of the modern cases concerning these issues of "regulation" and "taking", the context is the landowners uses are attempted to be limited by the Governmental authorities and either (a) the Government authorities seek to halt or curtail the use, *Goldblatt*, supra; *Hadacheck v. Sebastian*, 239 US 394, 60 L Ed 348, 365 S Ct 143 (1915); *United States v. Central Eureka Mining Co.*, supra, or (b) the landowner seeks permission to perform the use but is denied such permission and seeks judicial review or begins inverse condemnation. *Penn Central*, supra, *Benenson v. United States*, 548 F 2d 939 (1977); *Maher v. New Orleans*, 516 F.2d 1051 (CA 5)(1975); *Donohue Const. Co. v. Montgomery County Council*, 567 F 2d 603 (CA 4) (1977); *O'Grady v. Montpelier*, 573 F 2d 747 (1978) (CA 2); *Kopetzke v. County of San Mateo*, 396 F. Supp 1004 (1975); *Archer Gardens v. Brooklyn Ctr. Dev. Corp.*, 468 F. Supp 609 (1979) *Arastra Limited Partnership v. Palo Alto*, 401 F. Supp.962 (1975); *Spears v. Berle*, 407 N.Y.S. 2d 590 (1978); *Society for Ethical Culture v. Spatt*, 416 N.Y.S. 2d 246 (1979); *Pinheiro v. County of Marin*, 131 Cal. Rptr. 633 (1976); *Frisco Land & Mining Co. v. California*, 141 Cal. Rptr. 820 (1978); *Sanfilippo v. Santa Cruz*, 415 F. Supp 1340 (1976); *Garland v. St. Louis*, 596 F. 2d 784 (1979) (CA 8th); *De-Tom Enterprises v. United States*, 552 F 2d 337 (1977); *Barbaccia v. Santa Clara*, 451 F. Supp.260 (1978); *Trust of Three v. Emeryville*, 430 F. Supp.833 (1977); *Lutheran Church v. City of New York*, 35 NY 2d 121, 316 NE 2d 305 (1974); *Lake County Estates v. Tahoe Regional Planning Agency*, 440 US 391, 59 L Ed 2d 401, 99 S Ct 1171 (1977); *Jacobson v. Tahoe Regional Planning Agency*, 558 F. 2d 928 (CA 9) (1977).

In a condemnation context, the special uses are compensated for, not destroyed, and compensation must be sure and certain.

Rochester Urban Renewal Agency v. Patchen Post, 407 N.Y.S. 2d 641 (1978); *Keystone Associates v. Moerdler*, 278 N.Y.S. 2d 185 (1966).

This Court has held that no extra value accrues from having a permit, *United States v. Feller*, 409 US 488 (1973) and yet the Connecticut Court has ruled failure to seek a permit destroys the value of the subject landfill by rendering the land "useless", *Hudson Water Co. v. McCarter*, 209 US 349, 355, 52 L Ed 878, 28 S Ct 529 (1908).

It is submitted that justice and equity require that just compensation cannot be depressed to less than 4% of the fair market value of the condemned parcel, by the belated imposition of permit regulations.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. ____

JOHN RUSSO, TRUSTEE and
RUSSO DEVELOPMENT CORPORATION

APPELLANTS

v.

TOWN OF EAST HARTFORD

APPELLEE

ON APPEAL FROM

THE SUPREME COURT OF CONNECTICUT

APPENDIX

MEMORANDUM OF DECISION

By complaint dated January 29, 1975, the plaintiffs brought the above-entitled action in which they appeal from an assessment of damages made by the Town of East Hartford concerning the taking of plaintiffs' land for redevelopment purposes.

The plaintiffs owned certain land in East Hartford, comprising about 9.5 acres lying on the easterly side of Elm Street and bounded northerly by land of Consoli and on all other sides by land, now or formerly of the town, all of which is set forth in the complaint, and which property I have viewed. On January 20, 1975, the town council acting on behalf of the town, notified the plaintiffs that it had filed with the clerk of the Superior Court a statement of compensation. Said notice recited that the clerk should issue a certificate of taking for recording in the office of the town clerk whereupon title to the land would vest in the town. It was also indicated that the amount of compensation to be paid was $11,750 which amount, pursuant to General Statutes Sec. 8-130, was deposited with the clerk of the Superior Court. The appeal does not dispute the validity of the taking but rather the claim is made that the determination and award of damages is inadequate, unreasonable and not just compensation for the taking of the property. The plaintiffs claim to be aggrieved and seek a reassessment of damages.

Following a motion made by plaintiffs, the Superior Court referred the matter to the undersigned on April 30, 1975. There followed several motions with action taken thereon, and finally the matter was assigned for trial which began on July 9, 1975. The trial continued intermittently over a period of many months consuming nine trial days.

The land involved can best be described as a large hole in the ground resulting from earlier excavating operations. The plaintiffs purchased this land on October 18, 1966 for the sum of $5,000. The plaintiffs are now, and have for many years, been involved in the business of excavating, grading and land clearing. Their business requires that they be able to dispose of materials excavated from other sites. They purchased the instant land as a land fill site where they could dump and dispose of such materials. Since acquiring the land in 1966, and until the early part of 1975, plaintiffs have dumped on the site about 10,000 cubic yards, the bulk of which was done in 1966 and 1967. There was testimony that the hole in the ground had a capacity to hold 349,000 cubic yards of such dump material. The plaintiffs claim that the subject property had a business use conducted on it as a land fill which should be considered as a value factor. The claim is also made that the highest and best use of the property is that of a private fill site and that the land had a non-conforming use.

When the town adopted new zoning regulations on December 6, 1966, the subject property was classified as a Residence 4 (R-4) zone pursuant to Section 340 of the East Hartford zoning regulations. At that time there were no filling permit regulations applicable to that property. However, the subject property was in flood plain zone on December 6, 1966. In November and December of 1972, after required newspaper-published notices and followed by the required public hearings, the zoning regulations were amended in two ways. Section 262.1 provided in part that no owner shall carry on filling operations "unless and until, after application to and a public hearing by the Planning and Zoning Commission shall first determine that the filling operation . . . is necessary and essential to the development of the premises . . . , for a

use that is permitted under the currently effective Zoning Regulations of the Town. . . ."

In addition to the foregoing, the zoning regulations were amended so as to change the entire zone in which the subject property was located. This appears under general section 370-Flood Plain Districts. In Section 372 thereunder, entitled: "Standards for Plan Approval in Flood Plain District" it is provided in part that in "a Flood Plain District . . . , nor shall any land use be established, and no excavation or filling of land be made until a site plan for . . . land use and fill be approved by the Planning & Zoning Commission. . . ."

In August of 1972, the State of Connecticut established channel encroachment lines across approximately one-third of the subject land. This resulted in preventing plaintiffs from disturbing that part of their land within the encroachment lines by filling or excavating.

As a result of Public Act 155, entitled: "The Inland Wetlands and Water Courses Act" enacted in July of 1972, the town took prescribed action which affected plaintiffs' property as inland wetlands. This Public Act is now designated as General Statutes, §§ 22a-36 through 22a-45 and provides for a municipality to promulgate regulations acting under its commission. On January 14, 1975, through its Inland Wetlands Commission, certain regulations were adopted which were effective on February 1, 1975. These regulations do not allow excavating or filling operations as a matter of right and if such activity were contemplated, one would be required to obtain a permit following the holding of a public hearing.

Due to the foregoing, the following restrictions related to the subject land at the time of taking on March 28, 1975: (1) channel encroachment lines established on August 3, 1972 over approximately one-third of the land; (2) the entire parcel was zoned on November 14, 1972, as flood plain; (3) the town adopted a zoning ordinance, effective in December, 1972, requiring the obtaining of a permit to fill on the subject parcel; (4) the entire parcel became subject in May of 1972 to the Connecticut Inland Wetlands Act; (5) the entire parcel became subject, on January 14, 1975, to the town of East Hartford Inland Wetlands Regulations.

The fill permit requirements and the subsequent flood plain zone were enacted in 1972, as already recited. From the evidence there is no dispute that plaintiffs never appeared at the hearings related to the 1972 enactment. They did not appeal from the change as made by the town. The plaintiffs never applied for a fill permit, nor did they appeal the inland wetlands classification and seek compensation as provided by statute. In short, plaintiffs did not avail themselves of any procedural or administrative appellate steps which were available to them prior to the taking date. The plaintiffs contend they were not required to do anything upon the premise that they had a non-conforming use which made them immune from the town's exercise of police powers. As already stated, under the zoning regulations and the inland wetlands regulations in effect at the time of the taking, excavating and filling of land operations were permitted under special permits or where exceptions are granted by the Planning and Zoning Commission and the Inland Wetlands Commission after a public hearing.

The basic claim made by plaintiffs is that they had the unhindered right to use the land without restriction except for applicable zoning requirements, and in any event, had a right to a non-conforming use allowing them to continue dumping on the entire site. They maintain that

the highest and best use of the land was for a fill site and the hole, once filled to street level, would then be available as land upon which two-family houses could be built in accordance with existing zoning.

The plaintiffs claim that the present hole in the ground has a capacity of 349,000 cubic yards for dumping fill therein. Based on the testimony of one appraiser it would take seven years to fill the hole by that means; that they could charge others for dumping at the rate of $5 a ton, thereby producing a total gross income of over $2,000,000 or a yearly gross income of $289,571 and that deducting certain expenses would result in an annual net income of $218,082 over a period of seven years. The further claim is made that, at the end of seven years, the hole would be filled to street level and then be ready for development under zoning regulations, for building thereon two-family homes; that the filled-in land then would support 160 units on 44 building lots; that based on comparables, in seven years from the date of taking the lots would produce $396,000 computed at $9,000 a lot less a 10 per cent discount leaving a residual value at the time of taking in the amount of $203,211. He also testified that as a non-conforming use as a land fill it had a value of $1,200,000. Finally, this appraiser testified that if the land could not be used as aforesaid, it had a value at the time of taking of $5,000 an acre or a total value of $47,500. As a comparable, reference was made to a parcel of land, 34 foot below grade, bordering the Hockanum River, land locked, being in Flood Plain zone, bought by the town in December, 1975, containing 16.5 acres at $4,424 an acre.

The plaintiffs' second appraiser, using a similar approach to that above, testified that as a land fill, the property had a value of $804,800; that when the hole was filled, the surface area could be used for 44 building lots amounting in value to $211,900; that thereby, the property had a value of over $1,000,000. He further testified that if the property could not be used as a land fill, then it had a value at the time of taking of $50,000. Using the same comparable as the first appraiser, this witness used a value of $5,000 an acre. He also testified that this parcel, with some fill could be used in conjunction with adjoining town land for park purposes.

The subject property, described as flood prone, is about 6 feet above the normal level of the close-by Hockanum River which empties into the nearby Connecticut River. Testimony was produced indicating that if the Connecticut River is up 16 to 17 feet above sea level, the subject property floods. There was also evidence that this land has been flooded due to the back-up of water from these rivers, the water reaching a height of about 20 feet below street level. The depth of the hole on this land, at points, varies between 35 and 40 feet from street level. The average depth nearest the street is 22 feet. There was further testimony that it was necessary for the town to be able to maintain an open drainage ditch in order to allow flood water to recede into the river.

The plaintiffs contend they have a non-conforming use giving them the unlimited right to dump on the land in dispute and with which the town had no right to interfere. They claim that the regulations adopted and the classification are unconstitutional in their application to them. In a case dealing with an ordinance restricting a claimed beneficial use to which property had previously been devoted, it has been held that "[i]f this ordinance is otherwise a valid exercise of the town's police powers, the fact that it deprives the property of its most beneficial use does not render it unconstitutional . . ."

Goldblatt v. Hempstead, 369 U. S. 590; Teuscher v. Zoning Board of Appeals, 154 Conn. 650, 657; Waterford v. Grabner, 155 Conn. 431, 435; Troiano v. Zoning Commission, 155 Conn. 265, 267. "It is unquestionably true that any regulation under the police power for the use of property must have a reasonable relation to the public health, safety and welfare and must operate in a manner which is not arbitrary, destructive or confiscatory. . . ." Calve Bros. Co. v. Norwalk, 143 Conn. 609, 616. What local conditions require and the method of meeting those requirements are primarily matters of legislative concern. Courts can interfere only when the measures do not serve the public health, safety or welfare or are arbitrary and unreasonable. Hartland v. Jensen's, Inc., 146 Conn. 697, 703. "The ordinance merely requires that the plaintiff, as well as any other land owner in any zoning district in the town, must apply for a permit and comply with certain requirements in order to mine gravel and other earth products. It contains adequate standards for the guidance of the authority issuing the permit. . . . We conclude that the ordinance is a proper exercise of the police power and constitutionally valid." Teuscher v. Zoning Board of Appeals, supra, pp. 659, 660. See Vartelas v. Water Resources Commission, 146 Conn. 650, 654. From the evidence before me, it cannot be and was not disputed that the flood plain, fill permit requirements and inland wetlands classification were prescribed with a reasonable relation to public health, safety and welfare, nor are they arbitrary and unreasonable.

As I allude to it shortly, the value of the subject property should be based on its highest and best use on the date of taking. There was undisputed testimony that if the property was subject to the various statutory, zoning and administrative regulations, the highest and best use of the property was not as a private land fill site. How, then, should the measure of compensation be applied to the subject land as related to its highest and best use?

The usual measure of compensation is fair market value, or the price that would probably result from fair negotiations between a willing seller and a willing buyer. Connecticut Printers, Inc. v. Redevelopment Agency, 159 Conn. 407, 411; Eljay Realty Co. v. Argraves, 149 Conn. 203, 205, 206. In order to fix this fair equivalent in money, or value, or fair market value, it is the referee's duty to consider all the factors, circumstances and opinions expressed by the witnesses before him that would tend to affect the worth of the property taken and ultimately to make his own determination of just compensation. Moss v. New Haven Redevelopment Agency, 146 Conn. 421, 425. Just compensation means the full, perfect and exact equivalent, in money, for the property taken. The E. & F. Construction Co. v. Ives, 156 Conn. 416, 420. "[N]o one method of valuation is controlling and . . . the referee may select the one most appropriate in the case before him." Connecticut Printers, Inc. v. Redevelopment Agency, supra, p. 412; Brothers, Inc. v. Ansonia Redevelopment Agency, 158 Conn. 37, 43. Value will be affected by the uses which can be made of the premises, and a willing seller may reasonably be expected to sell to a prospective buyer who would use the property most advantageously and would therefore be willing to pay more than others. Connecticut Printers, Inc. v. Redevelopment Agency, supra, p. 411. One factor to be considered is the so-called highest and best use of the property or its most advantageous use. Housing Authority v. Lustig, 139 Conn. 73, 76. "The 'highest and best use' concept, . . . has to do with the use which will most likely produce the highest market value, greatest financial return, or the most profit from the use of a particular piece of real

estate." State National Bank v. Planning & Zoning Commission, 156 Conn. 99, 101. It is the duty of the trier of facts to reach his own conclusion as to the value of land, weighing all the circumstances bearing on value which are in evidence, the testimony of expert witnesses, and his own general knowledge of the elements which affect value. Slavitt v. Ives, 163 Conn. 198, 212-13. "Under circumstances in which the usual test of market value fairly ascertained is inefficacious owing to the unavailability of a willing buyer, the value must be determined from the opinions of well-informed witnesses, based upon all the uses for which the property is suitable, as a means of fixing what a reasonable purchaser would probably be willing to pay for it; and '[t]he highest and most profitable use for which the property is adaptable and needed or likely to be needed in the reasonably near future is to be considered, not necessarily as the measure of value, but to the full extent that the prospect of demand for such use affects the market value while the property is privately held.'" Olson v. United States, 292 U. S. 246, 255; Connecticut Printers, Inc. v. Redevelopment Agency, supra, pp. 412, 413; 27 Am. Jur.2d Eminent Domain, Sec. 281. It is for the referee to determine the weight to be given the testimony. Connecticut Printers, Inc., Ibid.

The defendant's appraiser testified regarding various comparables and gave as his opinion on the day he testified that the value of the subject land on the day of taking was $1,100 an acre. It was his opinion that at the time of taking, the highest and best use of the land was for a park use, public or private; that the highest and best use of the land was not for disposal therein of excess fill; and that no willing buyer would purchase the subject land as a fill site. It might be added that the plaintiffs' appraisers agreed that with the land subject to the various restrictions already discussed, no willing buyer would purchase the site for a land fill dump site. This same defendant's witness, at an earlier date had valued the subject land at $1,250 an acre. While I have used a round figure of nine and a half acres as the area of the subject land, the exact measurement given was 9.489 acres. This measurement as multiplied by $1,250 an acre comes to $11,861.

In my judgment, based on all the evidence before me, the land taken, on the taking date, had a fair market value of $47,500 and I so find. Accordingly, judgment may enter for the plaintiffs to recover from the defendant the difference between the amount placed on deposit and the sum of $47,500 together with interest on such difference from the day of taking, March 28, 1975 to date of payment, together with taxable costs and an aggregate in appraisal fees in the amount of $3,500.

As to claims for other fees for witnesses who testified for the plaintiffs, such as Phillip C. Smith, Bertrand L. McTeague and William C. Weaver, Jr., the applicable statute, Sec. 8-133 makes no provision for such fees and accordingly they are disallowed.

Louis Shapiro,
State Referee

Filed February 2, 1977

JOHN RUSSO, TRUSTEE, ET AL. *v.* TOWN OF EAST HARTFORD

COTTER, C. J., LOISELLE, BOGDANSKI, PETERS and HEALEY, Js.

Argued October 11—decision released November 20, 1979

Appeal from an assessment of damages for land taken by the defendant for landfill use, brought to the Superior Court in Hartford County and referred to *Hon. Louis Shapiro,* state referee, who rendered judgment reassessing damages, from which the plaintiffs appealed to this court. *No error.*

Mark C. Yellin, with whom, on the brief, was *Martin R. Libbin,* for the appellants (plaintiffs).

James A. Kane, Jr., for the appellee (defendant).

LOISELLE, J. The defendant town of East Hartford condemned a tract of land owned by the plaintiffs and filed a statement of compensation. On appeal to the Superior Court, the matter was referred to a state referee, who, exercising the powers of that court, rendered judgment reassessing damages, from which the plaintiffs have appealed.

The court's finding is in substance as follows. The plaintiffs purchased 9.489 acres of land in East Hartford on October 18, 1966, for $5000. The lot contained a large man-made hole approximately 35 to 40 feet deep where the plaintiffs, who were in the excavating and land clearing business, intended to dump their excess earth material. From the time the plaintiffs acquired the property until the time it was taken by the town on March 28, 1975, the plaintiffs dumped 10,000 cubic yards of fill into the hole. Although the plaintiffs used the hole to dump fill continuously between 1966 and 1975, the substantial portion of their filling operations occurred in 1966 and 1967.

The property, which is adjacent to the Hockanum River and in close proximity to the Connecticut River, is flood prone. In December 1966, amendments to the town's zoning regulations classified the property as both a residence zone and a flood plain zone, thereby rendering the premises nonconforming, but no permit was required for the plaintiffs' filling operations.

In 1972, both state and local law imposed new restrictions on the plaintiffs' use of the land. The Connecticut legislature enacted General Statutes §§ 22a-36–22a-45, "The Inland Wetlands and Water Courses Act," which classified the plaintiffs' lot as an inland wetland and required the plaintiffs to obtain a permit to perform a regulated activity such as filling. The commissioner of environmental protection established channel encroachment lines pursuant to General Statutes §§ 25-4a–25-4c, which prohibited the plaintiffs from disturbing the volume of material by either filling or excavating on approximately one third of the lot without prior approval by the department of environmental protection. The town of East Hartford, with due notice and after public hearings, enacted two amendments to its zoning regulations. The first amendment prohibited a landowner from engaging in filling operations without a permit. The second rezoned the area in which the plaintiffs' land was located to a flood plain in which excavation or filling without prior approval of a site plan by the planning and zoning commission was prohibited.

The plaintiffs did not challenge any of these newly imposed restrictions under the procedures established to contest them. The plaintiffs did not request a permit to fill under the Inland Wetlands and Water Courses Act, nor did they appeal the classification of their property as an inland wetland to the Superior Court, a right provided by the act. The plaintiffs did not file an application with the department of environmental protection for permission to disturb the volume of earth within the channel encroachment boundaries, and never protested the establishment of the channel encroachment lines, even when the land was condemned in March 1975. The plaintiffs did not file an application with the town planning and zoning commission for a permit to fill as required by the 1972 zoning amendments. They did not pursue their administrative remedies by objecting to the amendments or

exercise their statutory right of appeal. General Statutes §§ 8-6, 8-8 and 8-9.

In 1974, town officials suggested that the plaintiffs and the town build a common fence in front of their adjoining parcels of land to prevent others from dumping garbage and debris on the properties. The fence was erected and the plaintiffs paid their portion of the installation cost.

In January 1975, the town promulgated regulations pursuant to the Inland Wetlands and Water Courses Act which classified the plaintiffs' property as an inland wetland. The regulations required the plaintiffs to obtain a permit to fill on the land. Again, the plaintiffs did not object to the regulations at the public hearing and did not apply for a permit. In March 1975, the plaintiffs' land was taken by the town.

The facts recited above are not as detailed as those which appear in the finding, but they are sufficient to discuss the errors briefed.

We are confronted with a situation where the overwhelming number of errors assigned by the plaintiffs are not briefed. The assignment of errors lists 151 paragraphs of the plaintiffs' draft finding which the referee failed to include in his finding. Although the plaintiffs claim error on all 151 paragraphs, only four are briefed. In addition, the plaintiffs' brief relies on paragraphs in the draft finding, without reference to the appendix or any other source of authority, to support the claim that additions should be made to the finding.

"To secure an addition to the finding, an appellant must point to some part of the appendix, the pleadings, or an exhibit properly before us which discloses that the appellee admitted that the fact in question was true or that its truth was conceded to be undisputed." *White Oak Excavators, Inc.* v. *Burns,* 172 Conn. 478, 480, 374 A.2d 1097 (1977), quoting *Malarney* v. *Peterson,* 159 Conn. 342, 344, 269 A.2d 274 (1970). Furthermore, a fact is not admitted or undisputed merely because it has not been contradicted. *Xerox Corporation* v. *Board of Tax Review,* 175 Conn. 301, 304, 397 A.2d 1367 (1978); *Sachem's Head Assn.* v. *Lufkin,* 168 Conn. 365, 368, 362 A.2d 519 (1975).

The three paragraphs of the draft finding which are supported by the appendix are consistent with findings already made by the court and immaterial to the issues presented on appeal. The three remaining references to the draft finding claim error in the court's failure to quote in the finding amendments to the ordinances in their entirety rather than in relevant part. No additions to the findings are made under these circumstances.

The plaintiffs also claim that twenty-seven paragraphs of the finding were found without evidence. Nowhere in their brief are these paragraphs delineated so that this claim may be considered. Other assignments of error attacking the facts found concerned errors in dates and the plaintiffs' request for direct quotation of town zoning ordinances. Three of the dates were corrected by the trial court. The material portions of the town ordinances appear in the finding. The remaining claims of error with regard to dates or quotation of ordinances are either already included in the finding or not material to the issues presented on appeal and therefore need not be included in the finding. *Cutler* v. *MacDonald,* 174 Conn. 606, 610, 392 A.2d 476 (1978).

The plaintiffs' assignment of errors also attacks the trial court's conclusions. "Conclusions are not erroneous unless they violate law, logic or reason or are inconsistent with the subordinate facts. The court's conclusions are to be tested by the findings and not the evidence. . . . Conclusions logically supported by the finding must stand. [Citations omitted.]" *Connecticut Coke Co.* v. *New Haven,* 169 Conn. 663, 675, 364 A.2d 178 (1975), quoting *State* v. *Warren,* 169 Conn. 207, 213, 363 A.2d 91 (1975). The conclusions reached by the court are supported by the facts found in the finding and are logical and reasonable. The only issue to be reviewed is whether they are supported by the law.

The court found that filling or excavating on the plaintiffs' land was a permitted regulated use under the zoning regulations, and that the plaintiffs' right to fill and excavate under the Inland Wetlands and Water Courses Act was conditional upon their obtaining a permit. The plaintiffs, on the other hand, contend they had a nonconforming use to fill and excavate on the property and that this is why they did not exercise their administrative remedies or appeal to the courts under the statutes and ordinances discussed above. The plaintiffs claim that the statutes and ordinances did not permanently

prohibit filling but only postponed it until a hearing could be held to determine if a nonconforming use existed. This statement is not accurate. The statutes and ordinances do prescribe hearings, but the permits, if issued, are dependent on other factors as well as whether the use is nonconforming.

The plaintiffs contend that their failure to obtain permission to fill the hole did not destroy the nonconforming use, because it had already been established when the permit requirements were imposed and the permits could have been obtained. They argue that the court should have considered this important factor in its valuation instead of assuming that the right to fill had been permanently destroyed. It is undisputed that at the time of the taking in 1975, the plaintiffs had not obtained permits to fill as required by state statutes and town regulations. Whether there was a reasonable probability that such permits could have been obtained is a matter which must be resolved in the same manner as whether there is a reasonable probability of a zone change which would affect the value of the property taken. *Budney* v. *Ives*, 156 Conn. 83, 88–90, 239 A.2d 482 (1968). The plaintiffs bore this burden of proof. *Levine* v. *Stamford*, 174 Conn. 234, 235, 386 A.2d 216 (1978). Since the finding is devoid of any facts which would establish a probability that the permits, if requested, would have been granted, the court was not in error in concluding that the plaintiffs could not legally dump fill on the land at the time of the taking because the permits to fill had not been obtained.

The plaintiffs claim that because they had established a nonconforming use of their land, the regulations requiring permits did not apply to them and cite a number of cases that discuss the validity of nonconforming uses. The trial court's conclusion that the plaintiffs had a permitted regulated use and not a nonconforming use between 1972, when a permit was required, and 1975, when the land was taken, is correct. Both conforming and nonconforming uses become permitted regulated uses with the enactment of the statutes and ordinances. Furthermore, there is nothing in the finding to indicate that the regulations were not a valid exercise of the state's and the town's police powers. The fact that the use may have been nonconforming between 1966 and 1972, prior to the promulgation of these regulations, is not decisive because the regulations were applicable to both conforming and nonconforming uses of the land. *Teuscher* v. *Zoning Board of Appeals*, 154 Conn. 650, 657, 228 A.2d 518 (1967); see also *Waterford* v. *Grabner*, 155 Conn. 431, 435, 232 A.2d 481 (1967).

Next the plaintiffs claim that if the state and town regulations are applicable to them, the regulations are vague, void and unconstitutional. Other than the claim itself that the regulations are vague, there has been no showing of vagueness in the finding or in the argument.

The burden of showing that the regulations are unconstitutional rests with the plaintiffs. *State* v. *Rao*, 171 Conn. 600, 602, 370 A.2d 1310 (1976); *Kellems* v. *Brown*, 163 Conn. 478, 486, 313 A.2d 53 (1972), appeal dismissed, 409 U.S. 1099, 93 S. Ct. 911, 34 L. Ed. 2d 678 (1973). In *Goldblatt* v. *Hempstead*, 369 U.S. 590, 592, 82 S. Ct. 987, 8 L. Ed. 2d 130 (1961), the court said: "If this ordinance is otherwise a valid exercise of the town's police powers, the fact that it deprives the property of its most beneficial use does not render it unconstitutional." See also *Aunt Hack Ridge Estates, Inc.* v. *Planning Commission*, 160 Conn. 109, 117, 273 A.2d 880 (1970); *Teuscher* v. *Zoning Board of Appeals*, supra, 657. The plaintiffs do not rely on any fact found in the finding to indicate that the regulations, as applied to them, are unconstitutional. A reading of the regulations clearly shows that a public purpose was served by their enactment. *Windsor* v. *Whitney*, 95 Conn. 357, 367, 111 A. 354 (1920).

An oblique argument is made that the trial court's failure to consider the actions of the town in permitting the plaintiffs to fill between 1972, when most of the regulations were enacted, and 1975, the time of the taking, was inequitable. The plaintiffs' argument is based on matters in the appendix but not in the finding. The only portion of the finding referable to this argument are the paragraphs which state that in 1974, the plaintiffs and the town erected a common fence in front of their adjacent properties to prevent others from dumping garbage there. "An estoppel rests on the misleading conduct of one party which operates to the prejudice of another." *Ackley* v. *Kenyon*, 152 Conn. 392, 397, 207 A.2d 265 (1965). There is no showing that the plaintiffs'

rights were prejudiced by the actions of the defendant town. Before amending the zoning ordinances in 1972, the plaintiffs were given notice and an opportunity to be heard. Upon the enactment of the amendments in 1972, the plaintiffs could have applied for a permit to fill and appealed the town's denial, if any, to the Superior Court. Yet they failed to exercise their administrative remedies. Moreover, there is nothing in the record to show that the plaintiffs would not have agreed to build the fence even if permits to fill had been denied and the denial had been affirmed on appeal. Furthermore, the plaintiffs concede and the trial court found that they continued to fill the hole between 1972 and 1975. For almost three years, the plaintiffs continued to benefit from this use of the land without a permit.

It is a well established rule of law that a municipality's delay in enforcing a regulation will not estop it from exercising its police powers. *Ackley* v. *Kenyon*, 152 Conn. 392, 397, 207 A.2d 265 (1965); *State* v. *Stonybrook, Inc.*, 149 Conn. 492, 501, 181 A.2d 601 (1962); 56 Am. Jur. 2d, Municipal Corporations § 421.

The plaintiffs' remaining claim of error concerns the trial court's finding that the fair market value on the date of the taking was $47,500. The plaintiffs purchased the land in 1966 for $5000. According to the plaintiffs' brief, the plaintiffs' appraisers testified that it was worth $1,200,000 at the time of trial. The court found, however, that the plaintiffs' appraisers did not consider that the plaintiffs' property was subject to state and municipal restrictions on filling when they performed their appraisal, and that the plaintiffs' appraisers testified that if the property was subject to any of those restrictions, the fair market value at the day of taking was $5000 per acre, or a total value of $47,500, the amount awarded by the court.

The finding of the trial court that the initial appraisal of the plaintiffs' experts was not adjusted for the effect of the regulations is not attacked by the plaintiffs. Furthermore, there is nothing in the finding to indicate that the appraisal of $1,200,000, which does not appear in the finding, was binding upon the court even if there were no regulations to restrict filling operations on the land.

In a condemnation proceeding, the trial court is more than just a trier of fact or an arbitrator of differing opinions of witnesses. "He is charged by the General Statutes and the decisions of this court with the duty of making an independent determination of value and fair compensation in the light of all the circumstances, the evidence, his general knowledge and his viewing of the premises." *White Oak Excavators, Inc.* v. *Burns*, 172 Conn. 478, 484, 374 A.2d 1097 (1977), quoting *Birnbaum* v. *Ives*, 163 Conn. 12, 21, 301 A.2d 262 (1972). The trial court could properly conclude, after due consideration of the evidence, the inaction on the part of the plaintiffs and the existence of the regulations and their legal effect, that the appropriate valuation was $47,500. It cannot be said that this amount, which coincided with the valuation of the plaintiffs' own appraisers for the property subject to the restrictions, did not accurately assess the fair market value of the property at the date of the taking. *E & F Realty Co.* v. *Commissioner of Transportation*, 173 Conn. 247, 253–54, 377 A.2d 302 (1977).

There is no error.

In this opinion the other judges concurred.

The foregoing is a true copy of the original opinion as filed with the Reporter of Judicial Decisions, but the opinion is subject to alterations and additions by the judges until printed in the official bound-volume of the Connecticut Reports.

Donald H. Dawling
Reporter of Judicial Decisions

Supreme Court Judgment
Form JDSR-811

State of Connecticut

Supreme Court

At Hartford

First Tuesday of
October , 1979 .

No. 8546
John Russo, Trustee, et al

v.

Town of East Hartford

JUDGMENT

This appeal by the plaintiffs

from the judgment of the Superior Court for Hartford County at Hartford was filed with the Clerk of said Court on the 14th day of February , 1977 , and said appeal came thence to the 10th day of February , 1978 , when the appellant filed his assignment of errors, as may appear in the certified transcript of record on file in this Court,

and said appeal came thence to this Court at its term held at Hartford on the first Tuesday of March , 19 78 , and thence to the present term when the parties appeared and were fully heard.

And now this Court finds

there is no error.

Whereupon it is adjudged that ~~said judgment~~

~~and that~~ the defendant recover of the plaintiffs costs taxed at

Date of Judgment: November 20 , 19 79 .

By the Court,

Ronald P. Sherlock
Assistant Clerk-Appellate
Office of The Chief Clerk

Decision Announced: November 20, 1979

MACK

IN THE SUPREME COURT OF THE STATE OF CONNECTICUT

JOHN RUSSO, TRUSTEE, ET AL, APPELLANT

v.

TOWN OF EAST HARTFORD, APPELLEE

CIVIL ACTION NO. 8546

December 3, 1979

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that JOHN RUSSO, TRUSTEE, ET AL, the Appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Connecticut affirming the judgment of the Superior Court of the Judicial District of Hartford-New Britain at Hartford, entered in this action on November 20, 1979.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

MARK C. YELLIN
Attorney for Appellant
794 Farmington Avenue
West Hartford, CT 06119

LAW OFFICES OF
MARK C. YELLIN
794 FARMINGTON AVENUE
WEST HARTFORD,
CONNECTICUT 06119

JURIS NUMBER

All parties required to be served have been served.
December 3, 1979.

MARK C. YELLIN

HARTFORD, CONN. 06106
DEC 3 3 23 PM '79
THOMAS H. ...GRAHAM

Supreme Court, U. S.
FILED
MAR 3 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1182

JOHN RUSSO, TRUSTEE
AND
RUSSO DEVELOPMENT CORPORATION,
Appellants,

v.

TOWN OF EAST HARTFORD,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF CONNECTICUT

MOTION TO DISMISS OR AFFIRM APPEAL

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East Hartford, Connecticut

February 29, 1980

LEDGE PRESS, PRINTERS, HARTFORD

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1182

JOHN RUSSO, TRUSTEE
AND
RUSSO DEVELOPMENT CORPORATION,
Appellants,

v.

TOWN OF EAST HARTFORD,
Appellee.

**ON APPEAL FROM THE
SUPREME COURT OF CONNECTICUT
MOTION TO DISMISS OR AFFIRM APPEAL**

MOTION TO DISMISS OR AFFIRM

The Appellee moves the court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Connecticut on the grounds (a) that the questions on which the decision of the cause depends are so unsubstantial; (b) that the federal question(s) sought to be reviewed was not timely or properly raised, or expressly passed on; and (c) that the decision of the cause depends on an adequate non-federal basis as not to need further argument.

I.

STATUTES INVOLVED AND THE NATURE OF THE CASE

This appeal raises the question of the validity of the Zoning Ordinances, Sections 210, 230, 260-266 and 370-378 of the Town of East Hartford and of the General Statutes of the State of Connecticut Sections 22a-36 - 22a-45 (as amended) and Sections 25-4a - 25-9e (as amended).

In November and December of 1972 after notice, publication and hearing, the Appellee, Town of East Hartford enacted certain changes to its Zoning Code which affected the Appellant's property. Basically, what these changes provided was that prior to placing fill on their property, the Appellants were required to obtain a permit from the Appellee town. Additionally, these amendments resulted in a zonal classification of the Appellant's property, and subsequent thereto, the Appellant's property was designated property in a flood plain. A result of this zonal classification was that prior to the Appellants placing fill on their property, they had to obtain a permit from the Appellee town. In neither legislative enactment was filling prohibited, but rather, it was regulated through the requirement of obtaining a permit from the Appellee.

In July of 1972, the State of Connecticut enacted State Statutes 22a-36 - 22a-45 which became known as "The Inlands Wetlands and Water Courses Act". As a result of the State of Connecticut's legislative action, all of the Appellant's property was classified an inland-wetland and as a consequence of this designation, the Appellant, prior to placing fill on his property, had to obtain a permit from the State of Connecticut. In August 1972, pursuant to the authority contained in Sections 25-4a - 25-9e, the State of Connecticut enacted channel encroachment lines across the Appellant's

property, again with the result that prior to placing fill upon their property they had to obtain the approval of the Department of Environmental Protection of the State of Connecticut.

In March 1975, between two and one-half and three years after the enactment of zoning regulation changes and the Connecticut State Statutes, the Appellee town pursuant to Title 8 of the Connecticut General Statutes condemned and took title to the Appellants' property.

B. *The Proceedings Below*

Subsequent to the condemnation of the Appellants' property, the Appellants appealed the compensation paid to the Connecticut Superior Court, where the matter was referred to a State referee, who exercising the powers of the Connecticut Superior Court, rendered judgment reassessing the damages, whereupon the Appellants appealed to the Connecticut Supreme Court which reaffirmed the trial court's decision, see Connecticut Law Journal Vol. XLI, page 1 dated November 20, 1979.

II.

ARGUMENT

A. THE CASE PRESENTS NO SUBSTANTIAL QUESTION NOT PREVIOUSLY DECIDED BY THIS COURT.

Appellee would submit that the rationale of *Penn Central Transportation, et al* v. *City of New York, et al,* 438 U.S. 104, 57 L.Ed.2d 631 (1978) is dispositive of the Appellant's appeal. As this Court stated in *Penn Central, supra* at 125:

> ". . . in instances in which a State tribunal reasonably concluded that 'the health, safety, morals or general welfare' would be promoted by prohibiting particular

contemplated uses of land, this Court has upheld land use regulations that destroyed or adversely affected recognized real property interests. See *Nectow* v. *Cambridge*, 277 U.S. 183, 188 (1928) Zoning Laws are, of course, the classic example, see *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1927) . . ."

In reaching its decision, the Connecticut Supreme Court, after citing this Court's opinion in *Goldblatt* v. *Hempstead*, 369 U.S. 590, 592, 82 S. Ct. 987 (1961), decided that the zoning regulation changes enacted by the Appellee Town, e.g. Sections 210, 230, 260-266 and 370-378 in 1972 and Connecticut General Statutes Sections 22a-36 - 22a-45 (as amended) and Sections 25-4a - 25-9e (as amended) clearly showed that a public purpose was served by their enactment, and that they were a valid exercise of the State and Town's police powers.

Appellants contend that enactment of these ordinances and statutes in 1972 constituted a "taking" because they allegedly diminished the fair market value by more than 96%. The Appellee does not herein agree that the fair market value of the Appellants' property was decreased by 96%, however, Appellee would submit that this court in the *Euclid* v. *Ambler Realty Co.*, *supra* and *Hadacheck* v. *Sebastian*, 239 U.S. 394 (1915) cases clearly established the proposition that land use regulations, which are reasonably related to the promotion of the general welfare, which cause the diminution in value of property, standing alone cannot establish a taking.

The Trial Court and the Connecticut Supreme Court held that from the time of enactment of the Town's zoning ordinances and the applicable State of Connecticut Statutes in 1972 to the date of the taking in 1975, that the Appellants had a regulated permitted use, that is, they could place fill upon their property after acquiring the necessary permits

from the Town of East Hartford and the State of Connecticut. It is undisputed, and the Trial Court and the Connecticut Supreme Court so held, that from the time of enactment of the Town Zoning Ordinance and the Connecticut State Statutes in 1972 until the date of taking in 1975, that the Appellants never applied for or requested a fill permit from the Town of East Hartford or the State of Connecticut.

The Appellant hence is in the position of claiming that a taking occurred upon enactment of the Town Ordinances and the State Statutes in 1972 because these Ordinances and Statutes restricted the use to which they could put their property. However, since they had never requested or applied for a permit, they were and are unable to prove that, in fact their use had been restricted.

Ergo, the Appellant's position was and is, by the proof they offered, that a claimed diminution in value of their property constituted a taking. This position has been repeatedly held by this Court to be untenable.

B. THE CASE PRESENTS FEDERAL QUESTIONS SOUGHT TO BE REVIEWED THAT ARE NOT TIMELY, PROPERLY RAISED, NOR WERE THEY PASSED UPON BY THE CONNECTICUT SUPREME COURT.

Since the case of *Chesapeake and Ohio Railway Company* v. *McDonald, Administrator*, 214 U.S. 191, at 193 (1909), it has been well established that:

"This court; on an appeal from a State Court, cannot consider an alleged Federal question, when it appears that the Federal right thus relied upon had not been by adequate specification called to the attention of the State Court and had not been by it considered, not

being necessarily involved in the determination of the cause. *Green Bay and Miss. Canal Co.* v. *Patten Paper Co.*, 172 U.S. 52, 67; *Oxley State Co.* v. *Butter Co.*, 166 U.S. 648, 654, 655 and cases cited."

And in *Hiawassee Power Co.* v. *Carolina Tenn. Co.*, 252 U.S. 341, at 343 (1919) it was held that when the assignments of error in the State Court do not refer in any way to the Federal Constitution, nor was a Federal Constitutional question presented to the State Supreme Court for it to pass on, then an issue of substantial character was not presented to this Court.

A study of this Appellant's assignment of errors in the appeal to the Connecticut Supreme Court will show that they made no claim to, or specified any section of the U.S. Constitution or amendment thereto, which Appellants claimed the enactments of the Town's Zoning Ordinance and the State Statutes violated.

The Connecticut Supreme Court noted that the Appellants made some type of Constitutional claim, and disposed of this claim by stating that "other than the claim itself that the regulations are vague, there has been no showing of vagueness in the findings or in the argument." Appellee would further point out that the reference to unconstitutionality could, and probably was, to the Constitution of the State of Connecticut.

In sum., the Supreme Court of the State of Connecticut based on the trial court's findings, the Appellant's assignment of errors and the Appellant's arguments, never had placed before it, by the Appellant, any Federal Constitutional question, and in fact decided the cause on other issues.

C. THE CASE PRESENTS A DECISION OF THE CAUSE WHICH DEPENDS ON AN ADEQUATE NON-FEDERAL BASIS.

A reading of the Trial Court's findings and the opinion of the Connecticut Supreme Court make it clear that their decisions did not rest on anything other than Appellant's own failure to exercise their administrative and legislative remedies.

The case in question is a condemnation, and the basic issue was the amount of compensation the Appellants were entitled to. The law of the land is that compensation is determined by the fair market value of the property on the *day of the taking* and that fair market value is determined by what a willing buyer would pay a willing seller.

On the day of the taking, the Appellants' property was zoned a flood plain by the Town's Zoning Regulations and an inland/wetland by the State of Connecticut. This was undisputed testimony, from the Appellants' own expert witnesses, that if the Appellants' property was in a flood plain and an inland/wetland, then the fair market value of the property was $47,500.00.

The Connecticut Supreme Court found that the Appellants' Town and the State of Connecticut had properly enacted these regulations and statutes in a valid exercise of their police powers. It further found that the Appellants never exhausted their administrative or judicial remedies upon the application of these regulations and statutes to their property in 1972, despite the fact that there were stated appeal provisions and judicial remedies within these regulations and statutes. It further found that the Appellants never filed or requested a permit to fill their property and hence failed to prove that enactment of these regulations

and statutes between 1972 and 1975, the day of the taking, had or would have prevented them from filling their property.

Clearly the decision of this cause by the Connecticut Supreme Court was on the basis of an interpretation of the State of Connecticut's condemnation procedures and certain State Statutes and Town Zoning Regulations. There was no federal constitutional cause and none considered by the Connecticut Supreme Court. As has been established since *Hooker* v. *Los Angeles*, 188 U.S. 314, 320 (1902), a decision of a State Court in condemnation proceedings is not reviewable in the Supreme Court of the United States if no claim was advanced under the Constitution of the United States.

III.

CONCLUSION

WHEREFORE, Appellee respectfully submits that the questions upon which this cause depends are so unsubstantial, and/or, that the federal question sought to be reviewed was not timely brought, properly raised, nor expressly passed upon, and/or, the decision of the cause depends on an adequate non-federal basis so as not to need further argument, and the Appellee respectfully moves the Court to dismiss this appeal, or in the alternative, to affirm the judgment entered in the case by the Connecticut Supreme Court.

Respectfully submitted,

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PROOF OF SERVICE

All parties required to be served pursuant to Rule 33 have been served in accordance therewith.
February 29, 1980

JAMES A. KANE, JR.